No. 83-937

In the Supreme Court of the United States

OCTOBER TERM, 1983

MATIAS MONTEMAYOR DE LA PAZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an isolated reference at trial to petitioner's prior incarceration constituted reversible error.

2. Whether the trial court exhibited bias against petitioner in its instructions to the jury.

3. Whether the trial court committed reversible error by failing to instruct on the lesser included offense of conspiracy in violation of 21 U.S.C. 846.

4. Whether the trial court correctly instructed the jury concerning the continuing criminal enterprise offense.

5. Whether the evidence was sufficient to sustain petitioner's convictions.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 1983. A petition for rehearing was denied on October 6, 1983 (Pet. App. 14a-15a). The petition for a writ of certiorari was filed on December 5, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848 (Count 2); conspiracy to manufacture and distribute heroin and marijuana, in violation of 21 U.S.C. 841(a)(1) and 959 (Counts 3, 4, 5, and 9); distribution of

cocaine in the United States, in violation of 21 U.S.C. 841(a)(1) (Count 8); distribution of unspecified controlled substances, in violation of 21 U.S.C. 959 (Count 10); and distribution of cocaine outside the United States for importation to this country, in violation of 21 U.S.C. 959 (Count 12). He was sentenced to a term of 55 years' imprisonment and fined $100,000 on Count 2. In addition, forfeiture of certain items of petitioner's property was ordered in accordance with the jury's supplemental verdict. The sentences of imprisonment and fines on all other counts were to run concurrently with those imposed on Count 2. The district court imposed consecutive special parole terms of three years (Count 8), two years (Count 10), and three years (Count 12), to run concurrently with the sentence on Count 2.

1. The evidence at trial (see Pet. App. 2a-7a) showed that from 1975 through late 1981 petitioner and his four brothers engaged in a drug trafficking operation involving the distribution of marijuana, cocaine, and heroin, primarily in Chicago, McAllen, Texas, and Mexico. Petitioner was regarded as the leader of the five brothers (Tr. 147, 150, 174).

Ricky Lee Bowman, a stepson of one of petitioner's brothers, was the government's chief witness at trial (Tr. 124). Bowman testified that he was recruited to join the drug operation in 1975 (Tr. 125-128). Working out of his parents' trailer home in Chicago, Bowman packaged marijuana for resale and counted money. Bowman's stepfather, Benito Montemayor, directed this work; Bowman's mother and Salvador Flores also assisted. Two or three times each week Benito, Flores, Bowman and Bowman's mother each counted a stack of $20,000 to $30,000 in cash (Tr. 137, 256-257). Benito explained to Bowman that the money was not his and that if Bowman erred in counting it "Mat" (*i.e.*, petitioner) would "kick his rear end" (Tr. 128). Although

petitioner never participated in the activities in which Bowman was involved, Bowman saw petitioner pick up the money on one occasion in 1976 (Tr. 258). During this period Flores made 15 to 20 trips to Laredo, Texas, on each occasion returning to Chicago with marijuana or cocaine concealed in a van (Tr. 129-132). The conspirators also engaged in heroin transactions in this period, including a sale to a DEA agent in March 1976 (Tr. 84-85, 88-106, 123-124).

In September 1977, Bowman, Benito, and Benito's wife and children left Chicago and moved to a house owned by Benito in Monterrey, Mexico (Tr. 143-144). Thereafter, Bowman aided the Montemayor brothers (including petitioner, who also owned a house in Monterrey (Gov't Exh. 8; Tr. 145)) in cocaine trafficking, either by secreting cocaine in a van or by counting money. Benito or petitioner supervised the hiding of the cocaine after dark. The rear tail lights of a van would be removed and an aluminum panel dismantled. Then bags of cocaine, usually in a clothes basket, would be placed in the aperture, and the panel and tail lights would be replaced. Tr. 145-150.

Petitioner and Bowman also helped unload cash delivered to Benito's house by van. Petitioner, Bowman, Benito, and other members of the drug operation counted the money under petitioner's supervision. Tr. 146-147. Bowman alone counted amounts ranging from $100,000 to $500,000 (Tr. 147). Late at night, after the money had been counted, the president of a local bank would pick it up (Tr. 147-148).

The Montemayor brothers gathered frequently at a brothel in Monterrey to discuss their drug business and to meet with prospective purchasers. Petitioner presided over the meetings. Tr. 172-174. The brothers also organized a construction company, which Benito described to Bowman as a

"front" for a Mexican criminal syndicate (Tr. 174-175). In November 1977, petitioner, his brothers, and Bowman visited petitioner's heroin laboratory in Mexico (Tr. 161-162).

Following his marriage in the fall of 1979, Bowman moved to McAllen, Texas. Bowman helped his stepfather host parties, which were held following each successful completion of a drug transaction. During a three-week period, there were five to seven such parties, which petitioner attended. Following one of these parties, Benito Montemayor directed Bowman to help two other individuals load drugs into the rear well of a Chevrolet Blazer. Tr. 182-187.[1]

Petitioner presented no substantive evidence to refute the government's account of his involvement in the drug trafficking operations. The evidence he presented related only to whether certain items of his property were subject to forfeiture under 21 U.S.C. 848(a)(2) because they had been obtained with the profits of a continuing criminal enterprise.

2. The court of appeals affirmed petitioner's convictions (Pet. App. 1a-13a). The court concluded that there was sufficient evidence to sustain the convictions on the three substantive counts of the indictment, and that the evidence supported the conclusions that petitioner was the supervisor of the drug trafficking operations and had acquired numerous expensive assets with funds derived from those operations (*id.* at 3a-8a). The court also held that a brief reference at trial to petitioner's earlier incarceration in

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[1]In April 1981, Benito Montemayor's Chevrolet Blazer was seized and impounded by law enforcement officers (Tr. 434-435). In October and November 1981, authorities vacuumed the rear of that vehicle, as well as Benito Montemayor's pool table. They found traces of cocaine in both sweepings. Tr. 474-475, 479-480.

Mexico did not constitute error and that the reference was harmless in any event (*id.* at 9a-10a). In addition, the court of appeals held that the trial court's instructions to the jury were not improper and that, "[w]hen read as a whole, the charge presents a complete and impartial recitation of the law applicable to [the] case" (*id.* at 12a). The court noted finally that other contentions presented by petitioner were without merit (*id.* at 12a-13a).

ARGUMENT

1. Petitioner contends (Pet. 11-14) that the trial court erred in questioning a witness and subsequently refusing to grant a request for a mistrial based on the witness's reference to petitioner's earlier incarceration in a Mexican prison. That contention is without merit.

When considered in context, it is clear that the trial court's questioning and the witness's response were entirely appropriate. On cross-examination of Carlos Gutierrez, a Spanish-speaking witness, defense counsel asked a series of questions concerning the time periods that elapsed between each delivery of heroin by co-defendant Reyes Montemayor. The court intervened, apparently in the belief that Gutierrez was confused by the question (Tr. 66):

> THE COURT: But what he is trying to ask you is this. I believe you said that sometimes it would take you one week and sometimes two weeks and one time three days to sell the heroin. That's the way I understood your testimony. Is that correct?
>
> THE WITNESS: That is right.
>
> THE COURT: But over what times would Mr. Montemayor make the deliveries to you? Was it once a month or once every two months, or how were those deliveries spaced?
>
> THE WITNESS: Reyes Montemayor would go to Mexico —

Defense counsel then objected that he only wished to establish a time frame. The court overruled the objection, explaining that it appeared that the witness was trying to describe the time frame in his own way. The witness then continued to testify (Tr. 67):[2]

> THE WITNESS: Reyes Montemayor would go to Mexico once a week or once every two weeks to account to Matias Montemayor, and that is why Reyes Montemayor would tell me, "Brother, wait a while"—
>
> THE COURT: Cousin.
>
> THE WITNESS: "Cousin, wait a while for me to go talk to Matias at the prison, but Matias was about to leave or had already left."—
>
> THE COURT: No, about to be released.

Defense counsel moved for a mistrial because of the reference to petitioner's imprisonment, and the court denied the motion (Tr. 68-73).

The court of appeals correctly concluded that the trial court did not err in refusing to declare a mistrial. As the court of appeals noted (Pet. App. 10a), the reference to petitioner's prior incarceration was relevant because it showed the influence petitioner had over his brother and over the drug trafficking operation; any prejudicial effect on petitioner was incidental and would not require exclusion of the statement. See *United States* v. *Maestas*, 546 F.2d 1177, 1181 (5th Cir. 1977); Fed. R. Evid. 404. Moreover, as the trial court observed (Tr. 68-71), defense counsel took the risk and invited the response with his line of cross-examination about the time frame of the transactions. Thus, petitioner cannot now urge that the response

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[2]During this exchange, the trial judge (who speaks fluent Spanish) was correcting the interpreter's translation errors. See Tr. 67-68.

constitutes reversible error. See *United States* v. *Lerma*, 657 F.2d 786, 788 (5th Cir. 1981), cert. denied, 455 U.S. 921 (1982); *United States* v. *Witt*, 618 F.2d 283, 287 (5th Cir.), cert. denied, 449 U.S. 882 (1980); *United States* v. *Martinez*, 604 F.2d 361, 366 (5th Cir. 1979), cert. denied, 444 U.S. 1034 (1980). The trial court's participation in the questioning was merely an attempt to clarify an area of inquiry opened up by defense counsel.

Although the trial court mentioned that it would instruct the jury concerning the reference to petitioner's prior incarceration, it never did so, presumably because defense counsel never followed up with a request for such an instruction. However, the testimony at issue was brief and occurred early in the trial. None of the parties referred to it during the remainder of the trial. In those circumstances, it seems clear that petitioner was not prejudiced by the court's failure to give a limiting instruction.[3]

2. Petitioner also contends (Pet. 16-20) that the trial court's charge to the jury was biased. That contention lacks merit. The court of appeals correctly concluded that, when viewed as a whole, the trial court's instructions in this case were "a complete and impartial recitation of the law applicable to [the] case" (Pet. App. 12a).

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[3]Petitioner also complains (Pet. 14-16) that the trial court (1) refused to permit his counsel to question a witness about voice print identification; (2) improperly permitted the prosecutor to explain to the jury what certain exhibits depicted prior to their introduction into evidence and refused to allow defense counsel to question Bowman about several exhibits he was unable to identify; (3) improperly elicited from Bowman an identification of petitioner; (4) improperly questioned another witness regarding the purchase of petitioner's airplane; (5) wrongly allowed the government to introduce a "hearsay Drug Enforcement Administration report" and other "hearsay business records" into evidence and (6) unfairly identified one of petitioner's co-defendants for a witness. However, petitioner does not cite any authority for the proposition that these actions and rulings were erroneous, and he fails to explain how he was prejudiced by them.

It is well established that a trial court may comment on and summarize the evidence for the jury, so long as it does so fairly and in a manner that leaves the ultimate determination of relevant facts to the jury. See, *e.g.*, *Quercia* v. *United States*, 289 U.S. 466, 469 (1933); *Horning* v. *District of Columbia*, 254 U.S. 135, 138 (1920). Any individual instruction must be viewed in light of the charge as a whole. See *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973).

Petitioner picks out several isolated comments from a closing charge that covers 48 pages of the transcript (Tr. 870-918). In particular, he faults the trial court for explaining that there was nothing illegal or improper about the government's expenditures to pay informants or to buy drugs (Tr. 879). But that instruction was an entirely proper response to defense counsel's insinuations during closing argument that this practice was improper (Tr. 807-808, 812-814, 837). The court did not imply that the informant was credible because he had been paid by the government or that the court itself believed or disbelieved anyone (see Tr. 923-924). See *United States* v. *Partin*, 552 F.2d 621, 645 (5th Cir.), cert. denied, 434 U.S. 903 (1977). Indeed, the court instructed the jury that the testimony of "an informant who provides evidence in a case for pay * * * must always be examined and weighed by the jury with greater care and caution than that of an ordinary witness" (Tr. 879).

Petitioner failed to object at trial to the remaining instructions he cites (Pet. 18-20). See Fed. R. Crim. P. 30. Had he done so, the court might have provided clarification that would have eliminated any possible confusion arising from, *e.g.*, the terminology used to explain the complex elements of a continuing criminal enterprise. In any event, even the portions of the jury instructions quoted out of context by petitioner do not require the jury to return a guilty verdict on any count or otherwise reflect judicial bias.

When taken in context, it is clear that they form part of an entirely appropriate charge.

Following his discussion of the jury instructions, petitioner notes (Pet. 20) that two laboratory reports were mistakenly sent to the jury and that several jurors saw them. The reports showed that traces of cocaine had been found on a pool table belonging to petitioner's brother and in a truck Bowman identified as having been used to carry bags of cocaine. The reports were labeled as Defendants Exhibits 1 and 2 in connection with a pretrial hearing on a defense claim. Although the chemist who prepared the reports testified at trial, the reports themselves were not introduced into evidence.

Petitioner does not suggest how he was prejudiced by the fact that several jurors saw the reports. Moreover, the trial court instructed the jury not to consider the reports (Tr. 936):

> And I don't know whether you have looked at them or not. But if you have looked at them, I am going to instruct you not to consider anything that might have been in those reports. Just pretend you didn't see them.

The court added that the jury was entitled to consider the chemist's trial testimony "for whatever weight you want to give it, but do not consider anything in those exhibits" (*ibid.*). Following the verdict, the court conducted an inquiry into whether the jurors had seen the reports in the jury room (Tr. 990-991). In a written order denying a new trial (1 R. 1255-1259), the court correctly concluded that the jury's exposure to the reports during deliberations did not prejudice petitioner because the exhibits contained only technical data, were not inflammatory, did not relate to an issue hotly contested at trial, and were largely cumulative to the chemist's testimony. In these circumstances, the inadvertent exposure of the jurors to the reports did not

constitute reversible error. See, *e.g.*, *United States* v. *Bruscino*, 687 F.2d 938 (7th Cir. 1982) (en banc), cert. denied, Nos. 82-5575 and 82-5585 (Feb. 22, 1983); *Llewellyn* v. *Stynchcombe*, 609 F.2d 194, 195-196 (5th Cir. 1980); *Paz* v. *United States*, 462 F.2d 740, 746 (5th Cir. 1972), cert. denied, 414 U.S. 820 (1973); *United States* v. *Staples*, 445 F.2d 863 (5th Cir. 1971), cert. denied, 404 U.S. 1048 (1972).

3. a. Petitioner asserts (Pet. 20-24) that the trial court erred in failing to instruct the jury that a conspiracy charge under 21 U.S.C. 846 is a lesser included offense of the Section 848 continuing criminal enterprise offense, citing *Jeffers* v. *United States*, 432 U.S. 137, 153 (1977) (plurality opinion). Petitioner did not raise this question on appeal, and the court of appeals did not consider it; it is therefore not properly raised here. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). Moreover, since petitioner never requested the lesser included offense instruction, he cannot claim it as error on appeal. See Fed. R. Crim. P. 30. Cf. *Jeffers* v. *United States*, 432 U.S. at 154; *United States* v. *Young*, 655 F.2d 624, 627 (5th Cir. 1981). In any event, in view of the substantial evidence of petitioner's guilt of the continuing criminal enterprise charge (see Pet. App. 3a-8a), the trial court's failure to give a lesser included offense instruction on the conspiracy charge does not amount to plain error.

b. Petitioner also claims (Pet. 22) that the trial court erred in failing to instruct the jury that it was required to consider whether petitioner committed three specific underlying substantive violations before considering the remaining elements of a continuing criminal enterprise.[4] But the

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[4]In fact, the government was not required to obtain three substantive convictions in order to establish a violation of 21 U.S.C. 848. See *United States* v. *Lurz*, 666 F.2d 69, 78 (4th Cir. 1981), cert. denied, 455

jury in fact found beyond a reasonable doubt that he committed the three substantive drug offenses charged in the indictment. As the court of appeals concluded (Pet. App. 6a), the evidence was sufficient to sustain petitioner's conviction on those three counts. Thus, even if the trial court erred in failing to give the instruction for which petitioner contends, he suffered no prejudice.[5]

U.S. 1005 (1982); *United States* v. *Barnes*, 604 F.2d 121, 155-158 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980).

Petitioner cites (Pet. 22) 2 Devitt & Blackmar, *Federal Jury Practice and Instructions* § 58.21 (3d ed. 1977), for the proposition that guilt of certain substantive charges is a precondition to conviction on a continuing criminal enterprise count. But Devitt and Blackmar merely note that the sample instruction was given by the trial court in *United States* v. *Sperling*, 506 F.2d 1323 (2d Cir. 1974), cert. denied, 420 U.S. 962 (1975), also cited by petitioner. The Second Circuit in *Sperling* did not discuss the propriety of the charge or suggest that conviction on the substantive offenses was necessary to the conviction under Section 848. See 506 F.2d at 1344. Nor do Devitt and Blackmar suggest that such a charge is necessary. Instead, they state (2 Devitt & Blackmar, *supra*, § 58.21, at 470-471) (emphasis added):

> This charge [*i.e.*, continuing criminal enterprise] could be prosecuted separately but in the normal course of events would probably be tried along with substantive charges under Title 21, U.S.C. In such a case the finding of guilt on the other charges *could* be made a condition of conviction under Sec. 848.

[5]Petitioner suggests (Pet. 22) that because the trial court failed to instruct the jury that they must consider whether he committed three substantive offenses before convicting him of the Section 848 charge there is no way to determine which three drug felonies the jury used as the basis for the continuing criminal enterprise conviction. Petitioner contends that his sentence therefore may violate the constitutional prohibition against multiple punishments, since this Court has held that Congress did not intend to impose cumulative penalties under Section 848 and the underlying offenses used to prove that violation, citing *Jeffers* v. *United States*, *supra*. But in *Jeffers* the Court did not hold that cumulative penalties for violation of Section 848 and the underlying substantive offenses were improper; instead, it held only that Congress did not intend to impose cumulative penalties under Section 846 (the conspiracy provision) and Section 848. See 432 U.S. at 154-158,

c. Petitioner claims (Pet. 22-23) that the trial court also erred in instructing the jury that the predicate acts required for a continuing criminal enterprise conviction could be established by any drug violation proved by the evidence. Petitioner contends that the court should have limited the proof of predicate acts to those the government listed in connection with Count 2 in its response to petitioner's request for a bill of particulars. That claim lacks merit.

The continuing criminal enterprise count charged that the crime occurred from 1970 to the date of the indictment (November 17, 1981). Prior to trial petitioner moved for a bill of particulars, requesting, inter alia, the names and whereabouts of the individuals he was alleged to have organized, supervised or managed, the precise nature of his superior-subordinate relationship as to each, "the exact violations that the Defendant managed the foregoing people * * *," and the "precise" object of the enterprise (1 R. 1096-1097). At a pretrial hearing, the government provided a response that listed 13 individuals whom it claimed were subordinate to petitioner and indicated that the activities at issue occurred in Chicago, McAllen, Monterrey, and Cerralvo, Mexico. The government stated that the "date of the criminal act" was "during the months of September or October of 1977" and that the offense had occurred at Benito Montemayor's house in Monterrey. The government also stated that petitioner had "supervised through, but not limited to, direct oral commands the unloading of a large load of cocaine from the tail light areas of a Chevrolet Suburban. When an altercation between the persons being supervised arose, [petitioner] took direct command * * *."

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160. In any event, the district court did not impose any cumulative sentences on petitioner; his sentences on Counts 3 through 12 are to run concurrently with the sentence he received on Count 2 (the Section 848 charge). See page 2, *supra*.

The government described the object of the enterprise as including the manufacture, importation and distribution of heroin, cocaine and marijuana. 1 R. 1139-1140.

After reviewing the government's response at the pretrial hearing, petitioner's counsel objected that it was inadequate because it failed to set forth with particularity the precise acts of misconduct constituting the predicate for prosecution under 21 U.S.C. 848. The prosecutor replied that the government's response to the request for a bill of particulars was not intended to limit the proof. He noted that under the law of the Fifth Circuit the government was not required to reveal its evidence or theory of prosecution and that the indictment adequately informed petitioner of the charge against which he had to defend. Mar. 9, 1982 Tr. 31-32. The trial court noted that petitioner had been made aware of the government's case through his involvement in a hearing on a related civil forfeiture claim, as well as through extensive discovery under Fed. R. Crim. P. 16. Indeed, the court noted that petitioner had had "probably more pretrial discovery than any criminal case I ever heard of about the facts of the case and about the proof of the Government." Mar. 9, 1982 Tr. 33. The court agreed that a bill of particulars was not needed, and it rejected petitioner's request that the government specify the precise predicate acts. *Id.* at 32-33, 35.

The prosecutor's statements at the pretrial hearing make it clear that the government's response to petitioner's request for a bill of particulars did not restrict its ability to present evidence of acts not mentioned therein. The response did not specifically identify the predicate acts, and the trial court held that the government was not required to provide that information. The response referred at various points to petitioner's supervisory conduct in Chicago, McAllen, and Cerralvo, as well as in Monterrey, and described a number

of objectives of the enterprise. Thus, petitioner could not have been prejudiced by the failure to limit the government's proof to events occurring in September and October 1977.

Moreover, Count 2 charged a conspiracy-like offense. It is well established that in conspiracy trials the government may prove overt acts not stated in the indictment or a bill of particulars. See, *e.g.*, *United States* v. *Diecidue*, 603 F.2d 535, 563 (5th Cir. 1979), cert. denied, 445 U.S. 946 (1980); *United States* v. *Johnson*, 575 F.2d 1347, 1357 (5th Cir. 1978), cert. denied, 440 U.S. 907 (1979). Finally, a bill of particulars may be amended at any time, and a trial court's decision to allow such an amendment should not be reversed unless the claimant can show actual prejudice. See *United States* v. *Johnson*, 575 F.2d at 1356-1357. The record does not indicate that petitioner was surprised by any evidence adduced at trial. Indeed, the jury charge petitioner requested would not have limited the evidence of predicate acts to September and October 1977 (1 R. 1197). Thus, the trial court's refusal to limit the evidence in the manner sought by petitioner was not erroneous.

4. Petitioner contends (Pet. 24-25) that the jury charge was erroneous because it permitted a finding of guilt on the continuing criminal enterprise charge based on the vicarious liability principle of *Pinkerton* v. *United States*, 328 U.S. 640 (1946), and that the *Pinkerton* charge was inadequate in any event. These claims are without merit.

In *United States* v. *Michel*, 588 F.2d 986, 999, cert. denied, 444 U.S. 825 (1979), the Fifth Circuit held that "*Pinkerton* and its progeny [are] equally applicable to defendants charged with either conspiracy to violate the drug laws or a section 848 continuing criminal enterprise." In *Michel* the court reasoned that the *Pinkerton* vicarious

liability rationale is based on an agreement among co-conspirators under which they are partners in crime and an act of one in furtherance of the plan is the act of all. This partnership also is present, the court recognized, in the conduct of a continuing criminal enterprise, because the statute requires that a person act in concert with five or more other individuals. Thus, the court concluded, if the government proves the requisite concert of action, all members of the enterprise, including the manager, are responsible for the substantive offenses committed by each member during the course of and in furtherance of the plan. That holding is correct and does not conflict with any decision of this Court or any other court of appeals.

Contrary to petitioner's claim (Pet. 25), the trial court did not err in failing to instruct the jury that petitioner's liability was limited to "forseeable" acts of his co-conspirators. Petitioner did not object at trial to the omission of such language from the *Pinkerton* charge. In any event, the court's charge did not subject petitioner to "unlimited criminal responsibility" (Pet. 25). The court properly limited petitioner's vicarious liability to offenses committed by co-conspirators "during the course and in furtherance of the [criminal] plan" (Tr. 891).[6]

5. Petitioner claims finally (Pet. 26-27) that there was insufficient evidence to support his convictions. Of course, the evidence must be viewed in the light most favorable to

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[6]Petitioner suggests (Pet. 25) that the *Pinkerton* charge went too far by allowing the jury to hold him responsible for Salvador Flores' "marijuana trips" (see page 3, *supra*) when there was no evidence that he was a member of the conspiracy at the time Flores made these trips. But Bowman testified that on one occasion in 1976 petitioner came to the trailer where other conspirators were bagging the marijuana and counting the money they had collected from selling it and that on that occasion petitioner picked up the money (Tr. 258). In addition, during this period, Benito Montemayor indicated to Bowman that the money belonged to petitioner (Tr. 128).

the government. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942). The court of appeals summarized in detail the evidence that supported petitioner's conviction on each count and correctly concluded that it was sufficient to support the convictions (Pet. App. 4a-8a). That fact-bound conclusion does not warrant further review.

Petitioner's primary contention appears to be that Bowman's testimony that he saw the conspirators packaging cocaine and manufacturing heroin in Mexico in preparation for smuggling into the United States was "conclusionary" (Pet. 26) and that no laboratory test corroborated Bowman's statements that the substances he saw were illegal drugs. Although the substances Bowman referred to were not subjected to expert analysis, the jury was entitled to conclude that petitioner was trafficking in heroin and cocaine. Bowman's testimony indicated that he was familiar with the mode of operation of petitioner and his brothers and with the drugs that were sold. The government was not required to confirm Bowman's testimony through laboratory analysis. See *United States* v. *Quesada*, 512 F.2d 1043, 1045 (5th Cir.), cert. denied, 423 U.S. 946 (1975).

Petitioner also suggests (Pet. 27) incorrectly that he was convicted of being the manager of the drug conspiracy solely on the basis of Bowman's "general statement" that petitioner was "in charge." In fact, the government adduced specific evidence that petitioner directed loading of a vehicle used to carry cocaine (Tr. 148-150), that petitioner supervised the counting of the money the conspirators obtained during their trips to the United States (Tr. 147), that petitioner presided over the meetings the Montemayor brothers held to discuss their drug business and to contact prospective purchasers (Tr. 172-174), and that petitioner operated a heroin laboratory on his property in Mexico (Tr. 161-162). From this evidence, the jury could properly conclude that petitioner was the manager of the illegal drug operations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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